

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**ALEC J. MEGIBOW, M.D., as assignee of  
Jennie Rosario, a/k/a Jenny Rosario,  
08 CV 519 NDNY,**

**ECF CASE**

**Plaintiff,**

**CASE NO. 09 CV 6993  
(AKH)(RLE)**

v.

**Fred Hagen, Chief Benefits Officer,  
1199SEIU BENEFIT & PENSION FUNDS,  
as duly authorized designee of the  
Board of Trustees of the 1199SEIU  
Benefit Fund for Health and Human  
Service Employees,**

**NY COUNTY  
CLERK INDEX  
NO. 106627/09**

**Defendant.**

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**DECLARATION**

ANTHONY M. BENTLEY declares pursuant to 28 U.S.C. § 1746 as follows:

1. I am plaintiff's counsel herein, a member of the bar of this Court, am fully familiar with the facts and proceedings in this case and I submit this affirmation in support of plaintiff's motion to remand this cause, for attorneys fees, or, in the alternative (if remand be denied), to transfer venue to the Northern District of New York.

2. According to the United States Code, the notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial document setting forth the claim for relief upon which such action or proceeding is based.

3. On June 1, 2009 defendant moved in Supreme Court, NY County, to dismiss this action upon the grounds (*inter alia*) that "it is [sic] claim for benefits from an ERISA employee benefit plan, is preempted by ERISA, and this Court does not have subject matter jurisdiction." (Ex. 1, hereto, excerpted from Ex. D to the complaint.)

4. The removal document demonstrates that defendant's *case* is based principally on ERISA, which is the *basis* of the removal.

5. Defendant is on record as having stated this position at least as early as June 1, 2009; defendant filed the removal document in this Court on August 7, 2009, over two months after publishing the June 1 dismissal motion document.

6. The removal is patently **untimely**.

7. Plaintiff respectfully requests that an order of remand issue forthwith.

8. Plaintiff's counsel has expended in excess of eleven hours thus far in the preparation for the defense of this motion.

9. Plaintiff further requests an award of attorneys fees expended by plaintiff in the defense of this documentarily untimely removal.

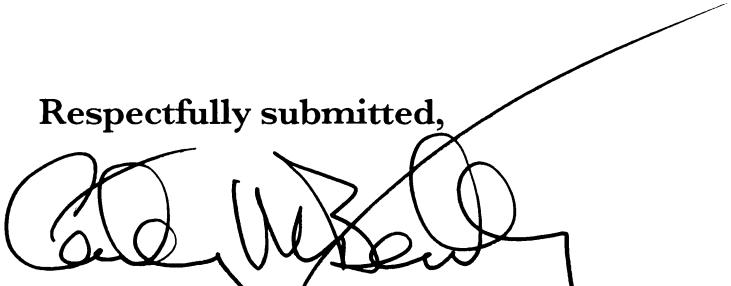
10. In the event that the Court in its unreviewable discretion elects to deny remand, it is respectfully requested that an order issue transferring venue hereof to the Northern District of New York, the provenance of the dispute (see caption of this case) the *settlement* of which resulted in the agreement, the *breach* of which is the subject of this action.

Dated:

New York NY

August 16, 2009

Respectfully submitted,



/s/Anthony M. Bentley  
Anthony M. Bentley #AB1853  
A. M. Bentley, P.C.  
Plaintiff's Counsel  
116 West 72nd Street  
New York NY 10023-3315  
212 459-4067 Fax 877-2868

**EXHIBIT**  
**1**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

X

ALEC J. MEGIBOW, M.D. as assignee of Jenny Rosario,  
a/k/a Jenny Rosario

Index No. 106677/09

Plaintiff(s),

## NOTICE OF MOTION

against:

FRED HAGEN, Chief Benefits Officer,  
1199SEIU BENEFIT & PENSION FUNDS,  
as duly authorized designee of the BOARD OF TRUSTEES OF THE  
1199SEIU BENEFIT FUND FOR HEALTH AND HUMAN SERVICE EMPLOYEES

Defendant(s).

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PLEASE TAKE NOTICE, that upon the annexed Memorandum of Law, and the affidavit of Jennifer Pagan, sworn to on June 1, 2009, the undersigned, counsel for Defendant 1199SEIU National Benefit Fund ("Fund"), shall move before this Court at the courthouse located at 60 Centre St., NY, NY 10007, Rm 130 on the 25<sup>th</sup> day of June, 2009, at 9:30 a.m., or as soon thereafter as counsel may be heard, for an order pursuant to CPLR 3211 dismissing this action against the Fund, or in the alternative, pursuant to CPLR 3212, for an order granting summary judgment in favor of the Fund.

Dated: New York, New York  
June 1, 2009

1199SEIU National Benefit Fund

By:

*Suzanne A. Metzger*  
Suzanne A. Metzger  
Asst. General Counsel, Legal Department  
330 West 42nd Street, 31st Floor  
New York, NY 10036  
p. (646) 473-6041  
f. (646) 473-6049  
Attorney for Defendant

To: A. M. Bentley, P.C.  
116 West 72<sup>nd</sup> Street  
New York, NY 10023  
Attorney for Plaintiff

EXCERPT  
from  
EX. D. Complaint

no standing to sue the Fund because there is no assignment of benefits and because Fred Hagen cannot be sued personally. ii) Plaintiff failed to state a claim based on the fact that there was nothing plead and the claim. iii) it is a claim for money against a trust fund, and so is a claim at equity and that Court does not have jurisdiction. iv) it is claim for benefits from an ERISA employee welfare benefit plan is pre-empted by ERISA, and this Court does not have subject matter jurisdiction. v) Plaintiff failed to exhaust his administrative remedies as required by the terms of the Plan and the Department of Labor regulations.

## Relevant Facts and Procedural History

The Fund is a multi-employer trust fund established in accordance with Section 186(c) of the Labor Management Relations Act of 1947, an "employee welfare benefit plan" as that term is defined in Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 et seq. ("ERISA") and a Voluntary Employee Beneficiary Association, as that term is defined in Section 501(c)(9) of the Internal Revenue Code (See form 5500 attached to Pagan Aff. As Exhibit "B") (Pagan Aff. ¶ 3).

As a multi-employer trust, the Fund is entirely financed with contributions from contributing employers pursuant to various collective bargaining agreements with 1199SEIU United Health Care Workers East, a labor union for health and human service employees (Pagan Aff. ¶ 4). The Fund is self-funded and administered by a Board of Trustees consisting of representatives of both labor and management for the purpose of providing health care and welfare benefits to covered employees and their dependents in accordance with a written summary plan description ("SPD"). (Pagan Aff. ¶ 5). The policy choices of each fund are set forth, pursuant to ERISA's notice and disclosure requirements, in laymen's terms in the SPD, which is distributed to all participants upon enrollment in the respective fund. (Pagan Aff. ¶ 6).

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EXCERPT  
from  
EX. D. Complaint